

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S  
APPENDIX**





77-1018

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IN THE  
**United States Court of Appeals**

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

VS.

MICHAEL PATRICK BARRETT and  
FERDINAND SANTANA,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK.

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**APPELLEE'S APPENDIX**

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DECISION AND ORDER

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-76-95

JOSEPH CHARLES FERRARO,

Defendant

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APPEARANCES: RICHARD J. ARCARA, ESQ.  
United States Attorney  
(ROGER P. WILLIAMS, ESQ., of Counsel)  
Buffalo, New York, for the Government.

JOSEPH CARLISI, ESQ.  
Buffalo, New York, for the Defendant.

A few hours after a bank robbery in the Town of Tonawanda on June 16, 1976, each of the defendants in this case was apprehended in an apartment on Richmond Avenue in Buffalo. Each was later indicted for robbery, larceny and assault, violations of 18 U.S.C. §2113(a), (b) and (d). On November 3, 1976 the jury convicted Santana on all three counts, Barrett on Count II and Ferraro on Count II. On the remaining counts as to Ferraro and Barrett, the jury reported it could not reach a verdict.



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Defendant Ferraro has now made a series of post-trial motions pursuant to Federal Rules of Criminal Procedure 29 and 33 for a judgment of acquittal or, in the alternative, for a new trial. The defendant claims that the court erred in denying his motion to suppress certain evidence against him, in denying his motion to sever his trial from that of Barrett and Santana, in denying his several motions for a mistrial, in refusing to charge the jury as the defendant had requested, in restricting his cross-examination of a Government witness, and in the court's instructions to the jury during its deliberations. We will take up the defendant's arguments one at a time.

I. SUPPRESSION

On October 7, 1976 this court filed a written opinion explaining its reasoning for suppressing certain evidence and not suppressing other evidence discovered at the time of the defendant's capture shortly after the bank robbery. The defendant has not drawn the court's attention to any case requiring a change in position and the

court adheres to its prior decision.

## II. SEVERANCE

Neither is there any necessity at this point for a lengthy discussion on the severance question. There were many items of evidence introduced at trial by the Government. Because of the court's ruling on Ferraro's suppression motion, a few of these items were held to be inadmissible against him. When these items were introduced in evidence, the court took pains to make clear to the jury that these few items could only be considered with respect to Barrett and Santana and could not be considered against Ferraro.

## III. MISTRIAL MOTIONS

During the course of the trial, Ferraro made several motions for a mistrial. The reason for the first of these motions was that a number of jurors witnessed a fight that occurred in the hallway outside of the sixth floor courtroom after the trial had recessed for lunch.



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A brief review of the circumstances surrounding the fight shows the following.

The jury was dismissed before the spectators or the defendants. As chance would have it, some of the jurors, who had proceeded to the fifth floor where the jury room is situated, then took an elevator which they thought was going to the first floor. Instead, the elevator came back up to the sixth floor, on which the courtroom is located, and, as the doors opened, the jurors on the car could see a fracas ensuing in the far end of the hallway near the courtroom doors. Most of the jurors stayed on the car and, after its doors closed, they went to the main lobby of the building and left the courthouse. Two or three jurors stepped out of the elevator into the sixth floor corridor.

From the reports of the attorneys, and from the court's own observation, the fight took place as the spectators and Mr. Ferraro were leaving the courtroom. Evidently Ferraro's girlfriend and a female spectator scuffled, and Ferraro and a male spectator also exchanged blows. The fighting lasted two to three minutes.

After noon recess, the court personally met with each juror to discuss what he or she had seen. Some had seen nothing; others saw that a fracas was occurring, but were not able to identify participants. None was able to identify the defendant. Each of the jurors stated that the fight would have no effect on his or her ability to fairly and honestly carry out their sworn duties.

There was no reason for the court to disbelieve the jurors' statements. The defendant's contention that several jurors were only a short distance from the defendant at the time of the fight does not impugn their statements, because the fight was of short duration and the lighting in the hallway was extremely dim. Having taken the precaution of interviewing each of the individual jurors, and believing that the untoward event would not have any effect on their ability to fairly decide the issue before them, the court declined to declare a mistrial. In retrospect, the court believes that it was proper to continue the trial and sees no reason to declare a mistrial at this point.



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Later in the trial, an article with photographs appeared in the local morning newspaper which discussed several recent bank robberies in the suburban Buffalo area. It described similarities in the modus operandi of the culprits in the separate robberies, including, among other things, that the banks were located near expressways, the alleged robbers wore ski masks, long barreled handguns were used, and the robbers fled in one car only to switch to another nearby. The particular similarities noted in these suburban bank robberies and the photographs accompanying the article were strikingly similar to the evidence presented at the trial in this case.

The court agreed with defense counsel at trial that the article was potentially prejudicial and, therefore, questioned the jury in open court. Although one or two jurors admitted seeing the newspaper that day, no juror had read the particular article. The court cannot accept the defendant's argument that "[i]t is naive to accept the jurors' statements as being forthright." (Brief for Defendant, at 8). The court was satisfied at the time

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that none of the jurors saw the potentially prejudicial article and, therefore, declined to declare a mistrial. The court does not believe that the circumstances warrant a new trial at this time.

At the trial, the defendant Ferraro took the stand in his own defense. During the course of cross-examination, the Assistant United States Attorney asked Ferraro: "You've been free on bail, haven't you?" Ferraro argues that this question, coupled with the newspaper article, "served no other useful purpose except to infer that Ferraro had robbed a bank while free on bail." (Brief for Defendant, at 9). The court sustained the defendant's objection to this question at trial and cautioned the jury to disregard it. If the court believed that the Government intentionally attempted to infer Ferraro's complicity in other bank robberies, it would have declared a mistrial. But there was no indication at all that this was the prosecutor's intent and the court does not believe that this question constituted sufficient grounds for a mistrial.

Finally, the defendant urges that the Government's cross-examination of Ferraro about weapons in the



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Richmond Avenue apartment was improper and should have resulted in a mistrial, because the evidence of handguns had been suppressed as to Ferraro. Had the defendant's counsel not questioned him on direct examination about his ownership of guns or ammunition, and had all the weapons found at the apartment been suppressed as to Ferraro, the defendant might be correct in his assertion. But here, only the handgun found in an upstairs closet was inadmissible against Ferraro. Other handguns found on the premises were properly admitted in evidence against Ferraro. And, on direct examination, Ferraro was asked:

Q. Now, Mr. Ferraro, do you own any handguns?

A. No, I don't.

Q. Have you ever owned any handguns?

A. No.

Q. Have you ever had a permit for a handgun?

A. No.

Q. Were you aware of any handguns being located on your premises at any time?

A. No.

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Q. Did you have any ammunition for any handguns on your premises?

A. No.

Q. Were you aware that there was any ammunition in your refrigerator basement freezer?

A. None.

(Transcript, Oct. 27, 1976, at 1014-1015).

This questioning opened the door to the Government's cross-examination of Ferraro on the question of handguns and ammunition. United States v. Mariani, 539 F.2d 915, 923-24 (2d Cir. 1976).

#### IV. THE COURT'S CHARGE

Defendant next argues that the court's instruction to the jury on circumstantial evidence was insufficient because

nowhere in its charge was there language about the necessity of the government to prove each essential fact in the "chain of circumstances" beyond a reasonable doubt, or that they must conclude that the fair inferences drawn from such evidence must be consistent with guilt and inconsistent with innocence.  
(Brief for Defendant, at 11).



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The court has reexamined the transcript of the charge and does not believe that any error was made. The court stated during the course of its charge on circumstantial evidence:

If in your consideration of circumstantial evidence reasonably you may find that there are two inferences that arise out of a particular set of facts and circumstances and one inference reasonably points to innocence and the other reasonably points to guilt, then under our general notions of proof beyond a reasonable doubt you must accept the inference that points to innocence. (Transcript, Nov. 2, 1976, at 12).

V. CROSS-EXAMINATION

One of defendant's arguments in his own behalf was that after he was arrested, he asked to take a lie detector test. When the F.B.I. agent in charge of the investigation of the bank robbery, Special Agent McGuigan, testified at trial, he stated that he could not recall Ferraro's having requested a lie detector test. The defendant argues that the court impermissibly curtailed his cross-examination of Special Agent McGuigan, thus

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preventing him from impeaching McGuigan's credibility.

During his cross-examination of McGuigan, defendant's counsel tried to ask the agent about the affidavit the agent supplied when he filed a complaint against the three defendants. Defendant's counsel inquired as to the agent's knowledge of what individual witnesses had told the agent after the robbery. The court sustained the Government's objection to this type of questioning because the agent's report was a compilation of information from a number of sources and because the individual witnesses had testified in person at the trial. (Transcript, Oct. 27, 1976, at 945-950). It was not until later in the cross-examination that Agent McGuigan was asked if Ferraro had requested a lie detector exam. McGuigan said that he could not remember any such request and the cross-examination was then terminated by defendant's counsel.

#### VI. FURTHER JURY INSTRUCTIONS

After deliberating for some time, the jury sent a note to the court reporting that a verdict had been



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reached on one of the defendants, but that the jury could not agree as to the other two. The note stated that one of the jurors could not vote for a conviction based on circumstantial evidence. The jury also wanted to know if it could change its vote on the one defendant as to whom a verdict had been reached, because "they feel one is no more guilty or innocent than the other two." (Transcript, Nov. 2, 1976, at 69-70).

The court read the note aloud in front of the jury, with the defendants present, and told the jury that its vote was not final until it announced it in open court. The court then reinstructed the jury on circumstantial evidence. Defendant claims that this re-charge of the jury was prejudicial in that it exerted pressure on the jury to convict all three defendants.

After it read the jury's note, the court was careful to caution the jury again about the Government's burden to prove each defendant's guilt beyond a reasonable doubt. It then reexplained circumstantial evidence and cautioned that if there were two reasonable inferences, the one pointing to innocence must be adopted. Finally,

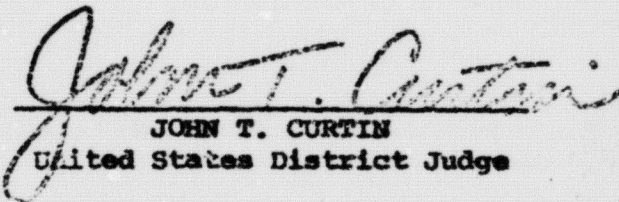
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the court asked the jury to resume its deliberation.

The court believes that the instructions to the jury after the court had received the jury's note were in all respects proper. The jury was cautioned both about the Government's burden on reasonable doubt and on the use of circumstantial evidence. The court does not believe that the jury or any member of the jury would have felt any coercion or pressure from the court to vote one way or another.

The motions of defendant Ferraro for acquittal or for a new trial are denied.

So ordered.

  
JOHN T. CURTIN  
United States District Judge

DATED: March 4, 1977



AFFIDAVIT OF SERVICE BY MAIL

State of New York )  
County of Genesee ) ss.:  
City of Batavia )

Re: USA vs. Michael P. Barrett  
& Ferdinand Santana

~~77-1081~~

77-1018

I, Leslie R. Johnson being  
duly sworn, say: I am over eighteen years of age  
and an employee of the Batavia Times Publishing  
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Buffalo, NY 14202, Att: Roger P. Williams Esq., Asst.  
U. S. Attorney

Leslie R. Johnson

Sworn to before me this  
13th day of April, 19 77

Patricia A. Lacey

PATRICIA A. LACEY  
NOTARY PUBLIC, State of N.Y., Genesee County  
My Commission Expires March 30, 1978